

No. 44233-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KIMBER TIMOTHY LEWIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-02322-4
The Honorable Frank Cuthbertson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted evidence that Kimber Lewis had two previous convictions for domestic violence assault.
2. The State failed to present sufficient evidence to establish that the assault was a domestic violence offense.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was evidence of Kimber Lewis' prior assault convictions probative of Lewis' truthfulness and credibility, and if so, did the probative value outweigh the highly prejudicial impact that prior identical convictions would have on the jury's ultimate determination of guilt or innocence? (Assignment of Error 1)
2. Where the evidence established that the victim was merely an occasional overnight guest at the apartment where Kimber Lewis lived, was there insufficient evidence to establish that Lewis and the victim "resided together" and therefore insufficient evidence that the offense was a domestic violence crime? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Kimber Timothy Lewis by Information with one count of first degree assault (RCW 9A.36.011). (CP 1) The State further alleged that Lewis was armed with a deadly weapon during the commission of the offense (RCW 9.94A.530, .533), and that the offense was a domestic violence incident (RCW 10.99.020). (CP 1)

After presentation of the evidence, Lewis moved to dismiss the domestic violence allegation for lack of proof, but the trial court denied the motion. (08/22/12 RP 220-21)

The jury convicted Lewis of first degree assault and answered the deadly weapon and domestic violence allegations in the affirmative. (CP 70, 72, 73; 08/23/12 RP 4)¹ The trial court imposed a standard range sentence totaling 234 months of confinement. (CP 85, 87-88; 11/26/12 RP 13) This appeal timely follows. (CP 98)

B. SUBSTANTIVE FACTS

During the summer of 2011, Lori Sands rented an apartment

¹ The trial transcript labeled Volume I will be referred to as 1RP. The remaining transcripts will be referred to by the date of the proceeding contained therein.

in Lakewood, Washington. (1RP 139, 140) She allowed Kimber Lewis to live at the apartment in exchange for money. (1RP 148; 08/22/12 RP 183, 199) Lewis stayed in one of the apartment's two bedrooms. (1RP 140; 08/22/12 RP 183) Sands also allowed her then fiancé, William Hunter, and some of his friends to occasionally shower and sleep at the apartment as well. (1RP 100, 102, 139, 140)

Sands, Hunter, Hunter's friend Edward Smith, Lewis, and Lewis' fiancé were all at the apartment on the night of June 6-7, 2011. (1RP 101, 104; 08/22/12 RP 169, 183-84) Hunter was upset because he suspected that Sands and Lewis might be engaged in a sexual relationship. (1RP 130, 147-48; 08/22/12 RP 185) Sometime after midnight on June 7th, Hunter demanded that Lewis leave the apartment, but Lewis refused. (1RP 102, 103) Hunter began banging on the door and walls of Lewis' bedroom, yelling at Lewis to go. (1RP 103 147; 08/22/12 RP 177, 188-90)

According to Hunter, he eventually decided to take a shower. When he was finished, he exited the bathroom and found Lewis standing in the doorway of his bedroom. (1RP 103, 108, 109) Hunter testified that Lewis said "I got you," then reached for a machete and came towards him. (1RP 109) Lewis swung the

machete, which hit Hunter just above his hand, nearly severing it completely off. (1RP 110-11) Hunter stumbled backwards into the bathroom. (1RP 113) But Lewis struck Hunter two more times with the machete, once on the hand and once on the chest. (1RP 112, 114)

Smith testified that he looked down the hall and saw Hunter backing into the bathroom, with Lewis following him. (08/22/12 RP 171) Lewis had a machete in his hand. (08/22/12 RP 171) Smith did not see Hunter holding any weapons. (08/22/12 RP 171) Sands did not see the altercation, but she heard Hunter scream so she ran to the bathroom. (1RP 141-42) She saw Hunter lying in the bathtub, Lewis standing in front of him holding a machete, and blood everywhere. (1RP 141-42)

Lewis then went outside and called 911. (08/22/12 RP 203) Lewis told the arresting officer that he "lost it" after Hunter repeatedly banged on his walls and door, and threatened to throw Lewis' belongings out of the apartment. (1RP 62) The officer testified that Lewis said he did not intend to cut Hunter, but he had "had enough." (1RP 62) At the hospital, Hunter told investigators that he walked towards Lewis to confront him because he was "not going to run" from Lewis. (1RP 131)

Lewis testified that he acted in self-defense. According to Lewis, Hunter had been making threats against him for several weeks. (08/22/12 RP 185-86) The month before the charged incident, Hunter and Lewis had a confrontation at the apartment, and Hunter threatened to kill Lewis. (08/22/12 RP 185-86) Hunter picked up a hammer and threatened to scalp Lewis with it. (08/22/12 RP 186) Hunter again threatened Lewis during a phone conversation on June 2nd. (08/22/12 RP 186-87)

Lewis testified that Hunter was pounding on his bedroom walls and door, and confronted Lewis about his relationship with Sands. (08/22/12 RP 188-90) Hunter demanded that Lewis move out, but he refused because he had paid Sands rent money. (08/22/12 RP 190) Hunter threatened to “kick [Lewis]’ ass,” and indicated that he would get the hammer and kill Lewis and his fiancé with it. (08/22/12 RP 190-91) Because Hunter had been taking drugs that night, Hunter’s statements caused Lewis to become fearful for his life. (08/22/12 RP 191)

Lewis went to his bedroom and got his machete for protection. (08/22/12 RP 192, 194) When it appeared that Hunter was going to get his hammer, Lewis struck Hunter with the machete. (08/22/12 RP 193) Lewis did not intend to hurt Hunter,

but wanted to protect himself and his fiancé. (08/22/12 RP 194)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT SHOULD NOT HAVE ALLOWED EVIDENCE OF LEWIS' PRIOR ASSAULT CONVICTIONS BECAUSE IT WAS NOT PROBATIVE OF HIS TRUTHFULNESS AND WAS HIGHLY PREJUDICIAL.

Before Lewis took the stand to testify in his defense, the State, citing ER 609, asked permission to elicit evidence that Lewis had twice been convicted of domestic violence third degree assault, once in 2003 and again in 2004. (08/22/12 RP 158-59) Lewis objected, but the trial court determined that because Lewis was claiming self-defense, his credibility was at issue and the probative value of the prior convictions therefore outweighed their prejudicial impact. (08/22/12 RP 160-61, 164-65)

Under ER 609, evidence of prior convictions may be admissible for the purpose of attacking the credibility of a witness, including a defendant in a criminal case. ER 609(a) states:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against

whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

While crimes of dishonesty are per se admissible for impeachment purposes under ER 609(a)(2), other crimes, such as assault, are only admissible under ER 609(a)(1) when the trial court specifically finds that the probative value outweighs the potential prejudice.

Rulings made under ER 609 are reviewed under an abuse of discretion standard. State v. King, 75 Wn. App. 899, 910 n. 5, 878 P.2d 466 (1994); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court abused its discretion in this case because the highly prejudicial nature of the evidence far outweighed its minimal probative value.

Although the decision of whether to admit a prior conviction is a matter of discretion for the trial court, the court “must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant’s credibility as a witness.” State v. Calegar, 133 Wn.2d 718, 723, 947 P.2d 235 (1997) (quoting State v. Jones, 101 Wn.2d 113, 118, 677 P.2d 131 (1984)). Prior convictions admitted under ER 609 must therefore have some relevance to the defendant’s ability to tell the truth. Calegar, 133 Wn.2d at 723 (citing Jones, 101 Wn.2d at 118-19)).

“[F]ew prior offenses that do not involve crimes of dishonesty or false statement are likely to be probative of a witness’ veracity.” Jones, 101 Wn.2d at 120.

In this case, Lewis’ prior assaults against an unknown victim(s) are hardly probative of whether, on June 7, 2011, Lewis felt that his life was in danger and believed he had to defend himself after Hunter threatened to kill him. The existence of these prior convictions does not shed light on whether Lewis was telling the truth about what happened in Sands’ apartment on the night in question.

However, it is well recognized that evidence of a defendant’s prior criminal history is highly prejudicial because of the evidence’s tendency to shift the jury’s focus from the merits of the charge to the defendant’s general propensity for criminality. Calegar, 133 Wn.2d at 724; State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a “bad” person and is therefore guilty of the crime charged. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987).

Furthermore, the potential for prejudice is even higher where the prior conviction is for an offense identical to that with which the

defendant is charged. See State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to “the inevitable pressure on lay jurors to believe that “if he did it before he probably did so this time.” As a general guide, those convictions which are for the same crime should be admitted sparingly[.]” Newton, 109 Wn.2d at 77 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967)). Accordingly, the fact that Lewis’ prior crimes were also domestic violence assaults tends to imply to the jury that Lewis has a propensity to commit domestic violence assaults, and therefore must have acted in conformity with that propensity on the night in question. The extreme potential for prejudice far outweighs the minimal probative value that these convictions provide.

The trial court therefore abused its discretion when it admitted this evidence, and the error is not harmless. These two assault convictions were the only prior convictions presented to the jury, so the evidence is not cumulative. And the outcome of the case should have depended on whether the jury believed Lewis’ account, or Hunter’s account. But rather than shedding light on Lewis’ truthfulness, and allowing the jury to judge his credibility against Hunter’s credibility, the evidence of Lewis’ prior offenses implied that Lewis had a propensity to commit domestic violence

assaults, and that he must have acted in conformity with that propensity on this occasion. It is therefore impossible to say that the jury would have disbelieved Lewis' account of the incident if this improperly admitted evidence were absent.

B. THE STATE'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE ASSAULT WAS A CRIME OF DOMESTIC VIOLENCE.

First degree assault is a "domestic violence" crime when it is committed by a family or household member against another family or household member. RCW 10.99.020(5)(a). The phrase "family or household member" includes "adult persons who are presently residing together or who have resided together in the past[.]" RCW 10.99.020(3). In this case, the evidence was insufficient to establish that Lewis and Hunter ever "resided together," and was therefore insufficient to establish that the assault was a crime of domestic violence.²

Lewis testified that he had been living at Sands' apartment for about nine months. (08/22/12 RP 184-85) According to Lewis, Hunter would occasionally come to Sands' apartment, and would

² Evidence is sufficient only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

stay for a day or two at a time. (08/22/12 RP 196) Hunter testified that he was released from prison on March 7, 2011, and did not have a place to live in June of 2011. (1RP 100, 102) He testified that on June 7th, he came to Sands' apartment to take a shower. (1RP 101-02) Sands only testified that she would allow Hunter to stay at her apartment overnight. (1RP 139) None of these witnesses testified that Hunter lived with Sands or that Sands' apartment was Hunter's residence at any time between his release from prison and the night of June 7th.

Hunter was merely an occasional overnight guest. Hunter and Lewis never "resided together." Accordingly, they were not "family or household members" under RCW 10.99.020, and the offense is not a "domestic violence" crime. The domestic violence designation should be stricken from Lewis' assault conviction.

V. CONCLUSION

Lewis' prior assault convictions had minimal probative value on the issue of Lewis' truthfulness and credibility, but was highly prejudicial and likely implied to the jury that Lewis had a propensity to commit domestic violence assaults. The trial court's error in admitting evidence of the prior crimes surely impacted the jury's consideration of the evidence and its determination of guilt.

Accordingly, Lewis' conviction should be reversed. Additionally, the State failed to establish that the offense was a "domestic violence" crime, so this designation, and any associated consequences of this designation, should be stricken.

DATED: May 6, 2013



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CERTIFICATE OF MAILING

I certify that on 05/06/13, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kimber T. Lewis, DOC# 905143, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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CUNNINGHAM LAW OFFICE

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